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April 12, 2016

TRANSMITTAL MEMORANDUM

Date: April 12, 2016

Re: Docket Nos. 2014-0356, 2014-0357, and 2014-0359

VIA: Mail ☒ Fax ☐ Pages: ☐ Courier ☐ Hand Delivery ☐ Email ☐

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Originals	Copies	Date	Description
	X	April 12, 2016	Commission Staff Report Concerning Termination Of Certain Utility Scale Solar Projects (Docket Nos. 2014-0356, 2014-0357, and 2014-0359)

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Public Utilities Commission
State Of Hawaii

Commission Staff Report
Concerning The Termination Of
Certain Utility Scale Solar Projects
(Docket Nos. 2014-0356, 2014-0357,
and 2014-0359)

April 12, 2016

Disclaimer: Commission staff prepared this report at the direction of the Chairman. The opinions expressed herein are those of commission staff and do not reflect any input by, or opinions of, the commissioners. Commission staff is solely responsible for the content of this report.

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Commission Staff Report Concerning The Termination Of Certain Utility Scale Solar Projects (Docket Nos. 2014-0356, 2014-0357, and 2014-0359)

1 EXECUTIVE SUMMARY

On March 2, 2016, the Chair of the Public Utilities Commission directed the commission staff to undertake an investigation of the events that led to Hawaiian Electric Company, Inc.'s ("HECO") decision to terminate three Power Purchase Agreements ("PPAs") previously approved by the commission in Docket Nos. 2014-0356, 2014-0357, and 2014-0359.

Docket No. 2014-0356 involves the PPA for renewable, as-available energy between HECO and Kawailoa Solar, LLC ("Kawailoa"). Docket No. 2014-0357 involves the PPA for renewable, as-available energy between HECO and Lanikuhana Solar, LLC ("Lanikuhana"). Docket No. 2014-0359 involves the PPA for renewable, as-available energy between HECO and Waiawa PV, LLC ("Waiawa").

In these three dockets, the commission approved PPAs for the construction of utility-scale solar projects with a total nameplate capacity of 112 MW, and a contract capacity of 109 MW, in the aggregate (the "Projects"). The three Projects are currently in various stages of construction. However, due to a number of concerns associated with missed milestones in the Purchase Power Agreements ("PPAs") and payments, on February 12, 2016, HECO sent a letter to Kawailoa, Lanikuhana, and Waiawa, stating that it was terminating the PPAs.

The purpose of this investigation is to set forth the relevant facts and circumstances surrounding HECO's decision to terminate the PPAs, and to provide Staff's preliminary assessment of whether HECO's decision was supported by those facts and circumstances.

As discussed below, commission staff's preliminary conclusion is that the record to date demonstrates that HECO did not aggressively pursue available options for completing the three Projects on a timely basis. Specifically, rather than actively negotiating with a financially and operationally capable purchaser, D.E. Shaw Renewable Investments, Inc. ("Shaw"), HECO's efforts were instead directed towards terminating the PPAs. The deteriorating financial condition of SunEdison, Inc. ("SunEdison"), the parent corporation of the Project developers, was later cited by HECO as a factor in its decision to terminate. However, at the time of that decision, circumstances had not changed dramatically from those that existed on January 22, 2016, when HECO proposed a set of conditions to SunEdison and Shaw pursuant to which HECO would forbear its termination rights under the PPAs.

Commission staff does not mean to suggest that SunEdison's financial difficulties were to be ignored or taken lightly. In fact, as of the date of this report, commission staff observes that SunEdison's financial condition is extremely uncertain, and may, at some point, result in SunEdison's bankruptcy. However, the record indicates that there was no concerted effort by HECO to have qualified bankruptcy counsel provide a detailed written analysis, prior to terminating the PPAs, of the risks associated with the sale of the facilities to Shaw, or how any such risks could be minimized, if not eliminated. Moreover, there was no serious effort by HECO to resolve any real or perceived risks through direct negotiations with SunEdison and Shaw to ensure that the Projects could be completed as planned.

Given the importance of these Projects to the State of Hawaii's ("State") renewable energy goals, commission staff finds HECO's decision to terminate to be premature. Presented with an opportunity to get the Projects "back on track," HECO instead concentrated on terminating the Projects. HECO does not, as of the date of this report, have any "shovel ready" replacement projects and, has stated that the timeline for completing any such projects under a new a request for proposals ("RFP") is 20-30 months at best. Thus, at this point, the Projects are at a standstill, with no firm date by which the Projects will be completed, or replaced with other projects.

One of the commission's primary mandates is to protect ratepayers. Commission staff observes that actions such as those taken by HECO here may discourage developers from participating in future RFPs, which may ultimately redound to the

detriment of ratepayers, potentially in the form of fewer responses and higher prices, among other things.

It is within HECO's discretion in the first instance to decide whether to negotiate with a particular entity, and whether to terminate a particular PPA. However, while those decisions rest solely with HECO, HECO clearly has the burden of proof to demonstrate that those decisions are consistent with the public interest. This issue will come into play should HECO seek recovery of any costs associated with, or attributable to, its decision to terminate the PPAs.

Based on the discussion in this report, commission staff preliminarily concludes that as of the date of this report, HECO has not carried its burden to clearly demonstrate that its actions were consistent with the public interest. Thus, staff recommends that the commission take no further action at this time because HECO has not yet filed any applications addressing or reflecting the impacts on ratepayers of its decision to terminate the PPAs. If and when HECO does so, the commission can complete its investigation and address any such issues.

2 BACKGROUND

The PPAs at issue here represent three solar projects addressed by the commission in a series of seven orders concerning proposed PPAs for so-called "utility scale" solar projects that were selected by HECO, and for which HECO negotiated the PPAs. In orders approving these three solar projects, plus one additional project in Docket No. 2014-0308, the commission stated that the projects, if approved and constructed, would provide significant quantities of renewable electricity for use by all customers on the system, and would, to some degree, displace the use of electricity generated from other fuels, including fossil fuels such as oil.

The commission further observed that electricity generated from these projects were tangible commitments that would directly contribute to the achievement of the State's near-term - as well as long-term - renewable energy goals. Nevertheless, in approving the projects, the commission also evaluated each project's PPA to determine whether each agreement (a) was cost effective and would result in lower rates to ratepayers; (b) would negatively impact system reliability; (c) would preclude consideration of other such projects in the future; and (d) contributed to

geographic diversity of utility-scale solar resources, so that changing weather conditions (such as cloud cover) would not impact all such projects in the same way.

Thus, the commission approved those PPAs negotiated and proposed for commission approval by HECO that demonstrated the best likelihood of providing long-term customer value that was and is commensurate with the obligations HECO has made under the agreements. The three PPAs – and the associated Projects - at issue here were found to have met this standard.

2.1 PRIOR DOCKETS

The Projects at issue here have some commonality with other projects addressed by the commission in previous dockets. These previous dockets include: (1) In re Hawaiian Elec. Co., Inc., Docket No. 2013-0156 (“Docket No. 2013-0156”), in which waivers from competitive bidding were sought for three independent solar power producer projects totaling 33 MWs in the aggregate (collectively, the “Initial Waiver Projects”); and (2) In re Hawaiian Elec. Co., Inc., Docket No. 2013-0381 (“Docket No. 2013-0381”), in which waivers from competitive bidding were sought for six independent solar power producer projects totaling 210 MWs in the aggregate (collectively, the “Second Waiver Projects”).

The Projects are also interrelated with HECO’s Power Supply Improvement Plan (“PSIP”), dated August 26, 2014, in In re Public Util. Comm’n, Docket No. 2014-0183 (“Docket No. 2014-0183”). The commission is currently reviewing HECO’s updated PSIP, filed on April 1, 2016. These Projects, and any potential replacements, will be addressed in the ongoing review in that docket.

A short description of each of these matters is necessary to an understanding of the current state of affairs. To begin, on February 13, 2014, the commission issued Decision and Order No. 31913 in Docket No. 2013-0156, approving HECO’s request for a waiver from the competitive bidding process for the three Initial Waiver Projects, totaling 33 MWs in the aggregate with an average levelized energy price of 16.142 cents per kWh.

Next, on August 4, 2014, the commission issued Decision and Order No. 32241 in Docket No. 2013-0381, approving HECO’s request for a waiver from the competitive bidding process for the six Second Waiver Projects, totaling 210 MWs

in the aggregate and with an average levelized energy price of 15.576 cents per kWh.

The commission imposed a number of conditions on the Second Waiver Projects. Among other things, HECO was required to demonstrate that:

- a. each PPA, as well as the aggregate amount of project solar PV capacity for both the Initial Waiver Projects and Second Waiver Projects, was and is consistent with HECO's PSIP;
- b. each PPA would result in lower energy costs to ratepayers after explicitly considering the cost to mitigate the reliability and system operational challenges associated with integrating substantial amounts of variable solar PV capacity onto the Oahu electric system;
- c. the incremental addition of each project in the portfolio of the currently-proposed waiver projects would continue to displace higher cost fossil-fuel based generation rather than lower cost fossil-fuel based generation;
- d. the reliability of the Oahu electric grid would be maintained for each project;
- e. any PPA resulting from a waiver granted for the Initial or Second Waiver Projects contained final pricing that represented a delivered cost of energy that included any and all tax incentives, as well as any and all grid integration/interconnection costs associated with interconnecting the individual project with HECO's system;
- f. HECO's renewable energy portfolio evaluation process would analyze and rank renewable energy projects from a long-term public interest perspective so as to ensure inclusion of more economically beneficial projects that may take a longer time to develop, and might be otherwise foreclosed if the utility project development queues are filled with only near-term projects; and

- g. HECO had a methodology for determining which of the Initial and Second Waiver Projects should proceed in such a way that was fair to both the developers and ratepayers by submitting a proposed selection methodology to determine which projects should continue in the event that the Oahu grid does not have the capacity to affordably incorporate all of the variable energy output from the proposed 'low cost renewable energy' projects.

In addition, the commission stated that within thirty days after HECO filed its PSIP, HECO was required to identify the amount of new utility-scale solar PV capacity by project and in total that satisfied each of the conditions set forth in Decision and Order No. 32241, Docket No. 2013-0381.

Thereafter, on August 18, 2014, the commission approved HECO's request to extend the deadline date to file any fully executed PPAs for the three Initial Waiver Projects in Docket No. 2013-0156, from June 13, 2014, to October 10, 2014. The commission stated that the requirements set forth in Decision and Order No. 32241 with respect to the Second Waiver Projects - as set forth above - also applied to the three Initial Waiver Projects in Docket No. 2013-0156.

On September 16, 2014, the commission denied HECO's request for an additional extension of time, from October 10, 2014, to December 4, 2014, to file any fully executed PPAs for the three Initial Waiver Projects in Docket No. 2013-0156.

On September 25, 2014, in Docket Nos. 2013-0156 and No. 2013-0381, HECO filed its response to the commission's directive requiring HECO to identify the amount of new utility-scale solar PV capacity by project and in total that satisfied each of the conditions set forth in Decision and Order No. 32241. As part of that response, HECO stated that: (a) the average energy price for the Initial and Second Waiver Projects was 14.129 cents per kWh, without the use of the State of Hawaii tax incentives; and (b) the average energy price would be lower if the State tax incentives were applied.

On October 10, 2014, HECO filed a single PPA in Docket No. 2014-0308; this PPA arose from Docket No. 2013-0156, the Initial Waiver Projects docket. Thereafter, on December 4, 2014, HECO filed six PPAs in Dockets Nos. 2014-0354 to 2014-0359, respectively. These six dockets arise out of Docket No. 2013-0381, the Second Waiver Projects proceeding, and include the three dockets at issue here.

2.2 THE KAWAIILOA, LANIKUHANA, AND WAIAWA PROJECTS

2.2.1 DOCKET NO. 2014-0356, THE KAWAIILOA PROJECT

Kawaiiloa Solar is a Delaware limited liability company, and is registered to do business in the State of Hawaii. Kawaiiloa Solar is a wholly owned subsidiary of Kawaiiloa Solar Holdings, LLC, which, in turn, is a wholly owned subsidiary of First Wind Solar Portfolio, LLC ("First Wind"). Based in Boston, First Wind is an independent renewable energy company exclusively focused on the development, financing, construction, ownership, and operation of utility-scale renewable energy projects in the United States. On January 30, 2015, SunEdison and TerraForm Power, Inc., acquired First Wind.

Kawaiiloa Solar was organized for the purpose of developing, constructing, owning, and operating the 49 MW PV facility (the "Project") in parallel with HECO's system. Kawaiiloa Solar's Project would be located in Waialua, Oahu, on land within Tax Map Key Nos. 6-1-006:001 and 6-1-005:001. The Project would be co-located with the existing Kawaiiloa wind farm ("Kawaiiloa Wind").

The Project would consist of approximately 214,000 crystalline modules, thirty-five 1.5 MW nominal inverters, an underground collector system, and a 34.5-138 kV substation, all of which would be constructed by Kawaiiloa Solar, and has a nameplate capacity of 49 MW. HECO proposed to interconnect the Project by tapping into HECO's existing switching stations at Kawaiiloa Mauka and Kawaiiloa Makai, which were constructed as interconnection facilities for Kawaiiloa Wind.

2.2.2 DOCKET NO. 2014-0357, THE LANIKUHANA PROJECT

Lanikuhana is a limited liability company formed in Delaware and registered to do business in Hawaii. At the time of the initial application, Lanikuhana was a wholly owned subsidiary of Mililani South PV, LLC, which is a wholly owned subsidiary of First Wind Solar Portfolio, LLC, which is a wholly owned subsidiary of the ultimate parent company, First Wind Holdings, LLC ("First Wind"). On January 30, 2015, SunEdison and TerraForm Power, Inc., acquired First Wind.

Lanikuhana was organized for purposes of developing, constructing, owning, and operating renewable energy projects, including the 14.7 MW PV Project at issue

here, in parallel with HECO's electrical system (the "Project"). Lanikuhana's Project would be located in Mililani, Oahu.

The Project, as proposed, would consist of approximately 65,900 crystalline modules, eleven 1.5 MW nominal inverters, an underground collector system, and a 34.5 - 138kV substation, and has a nameplate capacity of 15 MW and a Contract Capacity of 14.7 MW.

2.2.3 DOCKET NO. 2014-0359, THE WAIAWA PROJECT

Waiawa PV, LLC ("WPV"), is a Delaware limited liability company that is ultimately owned by First Wind Holdings, LLC ("First Wind"). On January 30, 2015, SunEdison and TerraForm Power, Inc., acquired First Wind.

WPV was organized for the purpose of developing, constructing, owning, and operating the 45.9 MW AC Net PV facility ("Project") in parallel with HECO's electric system. WPV's Project would be located in Waiawa, Oahu. WPV's Project would consist of approximately 210,000 crystalline modules, thirty three 1.5 MW nominal inverters, an underground collector system, and a 34.5–138kV substation.¹

2.3 COMMISSION ORDERS APPROVING THE PROJECTS

In a series of orders issued on July 31, 2015, the commission approved the PPAs pertaining to the Kawailoa, Lanikuhana, and Waiawa Projects.² The commission observed that it had reviewed all six of the proposed projects, and selected for approval those projects with the best likelihood of providing long-term customer

¹ The Waiawa Project is also referred to as the Waipio Project. However, for consistency, the project will be referred to as the Waiawa Project throughout this report.

² See In the Matter of the Application of Hawaiian Electric Company, Inc., For Approval of Power Purchase Agreement for Renewable As-Available Energy with Kawailoa Solar, LLC, Docket No. 2014-0356, "Decision and Order No. 33036," filed July 31, 2015; In the Matter of the Application of Hawaiian Electric Company, Inc., For Approval of Power Purchase Agreement for Renewable As-Available Energy for the 14.7 MW Solar Project Owned by Lanikuhana Solar, Docket No. 2014-0357, "Decision and Order No. 33037," filed July 31, 2015; and In the Matter of the Application of Hawaiian Electric Company, Inc., For Approval of Power Purchase Agreement for Renewable As-Available Energy with Waiawa Solar, LLC, Docket No. 2014-0359, "Decision and Order No. 33038," filed July 31, 2015.

value commensurate with the obligations HECO had made under the agreements. In making this determination, the commission placed the greatest weight on the following three factors.

First, in conjunction with the key long-term objective of achieving an affordable, high renewable energy portfolio, the commission focused on projects with a high probability of near-term savings. Thus, the commission placed the greatest importance on the reasonableness of the pricing and cost-effectiveness of each of the PPAs. Each of the three Projects had a price of approximately 13.5¢ per kWh: (1) Kawaihoa - 13.475¢ per kWh; (2) Lanikuhana- 13.575¢ per kWh; and (3) Waiawa -13.475¢ per kWh.

Second, the commission considered the geographic diversity of the proposed projects. The commission observed that given the geographic diversity of the projects' locations, there should be a lower probability that cloud cover over a portion of Oahu would result in the simultaneous loss or return to service of generation from the various projects. Stated differently, loss of service would be mitigated as some units would ramp down in output and others ramp up in output at a given point in time due to cloud cover moving over various parts of the island.

Third, the commission observed that since the initiation of the waiver process, the commission had consistently raised concerns about the capacity of the HECO grid to cost-effectively integrate all of the proposed projects with the existing renewable generation that is currently online or approved for interconnection. Thus, the commission concluded that prudent discretion must be exercised in the evaluation and approval of any long-term commitments to utilize the grid's finite capacity to integrate renewable projects.

Based on the commission's consideration of these factors, as detailed in each of the orders approving the three Projects, the commission approved the PPAs for each Project and closed the dockets.

3 RELEVANT CHRONOLOGY AND CONTEXT

3.1 PRELIMINARY MATTERS: ATTACHMENTS K AND L

Given that the termination of the Projects is grounded in the alleged failure of the Developers to meet certain milestones, the relevant portions of each PPA establishing those milestones are set forth in Appendix A.³

3.2 THE COMMISSION'S JANUARY 28, 2016 ORDERS AND SUBSEQUENT EVENTS

On January 28, 2016, the commission issued orders in each of these dockets pertaining to these Projects, directing HECO to file, by February 16, 2016, a report describing the status of HECO's and each developer's efforts to complete the milestones set forth in Attachments K (Guaranteed Project Milestones) and L (Reporting Milestones) in each PPA, as well as any other relevant information and matters related thereto ("January 28 Orders"). The commission stated that it had concerns about whether or not the Projects could be completed in a timely fashion. The commission further invited the Consumer Advocate and each Developer to file a response to these status reports on or before February 23, 2016. On February 18, 2016, the commission staff issued information requests concerning this matter.

On February 2, 2016, following the filing of the January 28 Orders, HECO sent letters to each of the three Developers notifying each that a milestone or payment had been missed, and stating that HECO was considering whether or not to exercise its termination rights. For example, with respect to Kawaihoa, HECO stated:

Seller's failure to meet the Substantial Commitment Milestone leaves the Company with serious concerns regarding Seller's ability to complete the project in a timely and acceptable manner. Hawaiian Electric is currently reviewing its rights and potential remedies

³ In this report, the terms "Developers" and "Sellers" are used interchangeably to refer to the party in the PPA that is responsible for developing the particular Project, and selling its output to HECO under the terms of the PPA. Shaw is the potential purchaser of the Projects from SunEdison.

under the PPA, including the right to terminate the PPA and collect Termination Damages as set forth above. In order to make this decision, Hawaiian Electric must consider and evaluate the course of action which is in the best interest of our customers and has the responsibility and obligation to seek relevant information on behalf of our customers to determine the status of the project and Seller's future ability to perform. It is imperative that the Company deliver the intended benefits of the project to our customers in a timely manner and meet the state's renewable portfolio standards of reaching 100% renewable energy, including considering other renewable energy projects if Seller is unable to perform its obligations under the PPA.

Docket No. 2014-0356, Letter from HECO to Kawaihoa Solar and SunEdison, dated February 2, 2016, at 2.

In response, in a letter to HECO dated February 5, 2016, SunEdison acknowledged the missed milestones, but further stated:

Over the past 3 years, these Projects experienced significant delays at several stages of development, and responsibility for this is shared. HECO's interconnection studies, PPA negotiations and execution, government approvals, and financing by Sellers all took months longer than anticipated. Each one of these delays made it increasingly difficult for Sellers to meet the intermediate milestones in the PPAs. However, despite the significant delays, we have successfully met the other Substantial Completion Milestones in the PPAs. Since the execution of the agreement to sell the Projects, the Sellers and D. E. Shaw have been working toward closing financing by March 15, 2016 for the Waipio PV and Mililani PV II projects and by April 15, 2016 for the Kawaihoa Solar project. . . .

As noted above, Sellers plan to cure the missed milestone by selling the Projects to D.E. Shaw, closing financing for the Projects by March 15, 2016 for the Waipio PV and Mililani PV II projects and by April 15, 2016 for the Kawaihoa Solar project, and completing construction by the Guaranteed Commercial Operations Date in the PPAs. Initial construction on the Projects began as early as October 2015 and is now well underway. As such, while the intermediate milestone of financing was not achieved by the planned date, the much more significant final milestone of finishing the projects will be achieved on time, so that the low-cost renewable energy will be available to HECO and its customers on schedule. Seller and D.E. Shaw are proceeding with financing diligence, but to date, HECO has refused to forbear from terminating the PPAs to enable the financing to close. HECO's forbearance is the last remaining significant item required for Sellers to complete the sale to D. E. Shaw, finance the Projects, and resolve the missed milestones.

Docket No. 2014-0356, Letter from SunEdison to HECO, dated February 5, 2016, at 1-2.

3.3 RESPONSES TO THE COMMISSION'S JANUARY 28, 2016 ORDER

3.3.1 HECO'S FEBRUARY 12, 2016 REPORT AND CONCURRENT ISSUANCE OF TERMINATION NOTICES

Consistent with the commission's January 28 Orders, on February 12, 2016, HECO filed identical reports in all three dockets ("HECO's February 12 Report"). Most importantly, HECO notified the commission that HECO had elected to exercise its termination rights with respect to each of the PPAs.

Stated simply, HECO's February 12 Report alleges that each of the Developers is in default under various provisions of the PPAs. Further, HECO alleges that Sellers have not cured important missed milestones despite the fact that HECO made

many accommodations in an effort to see the three Projects completed as promised.

However, staff observes that many of the claims concerning missed milestones are in the nature of the “give and take” of all construction projects. For example, there is a great deal of discussion concerning grading with respect to one of the Projects. While milestones were allegedly missed, in the end, the Seller agreed to completely regrade this Project.

This report, therefore, focuses on the specific milestones cited by HECO in the termination notice issued on February 12, 2016 (“February 12 Termination Notice”) for each project.

Kawailoa – In HECO’s February 12 Termination Notice, HECO states that it is terminating the PPA for Seller’s failure to meet a single Guaranteed Project Milestone, which is also defined as a Substantial Commitment Milestone. To wit, HECO alleges that Seller failed to “[p]rovide Company with documentation reasonably satisfactory to Company evidencing (i) the closing on financing for the Facility or (ii) the financial capability to construct the Facility (“Construction Financing Closing Milestone”),” by February 1, 2016. No other reason is cited for termination of this Project.

Lanikuhana & Waiawa - In each of HECO’s February 12 Termination Notices, HECO states that it is terminating the specific PPA due to Seller’s failure to meet the following. First, HECO states that each Seller failed to provide a payment for interconnection facilities as required on December 31, 2015, which, in HECO’s view, constituted an event of default. HECO does state that each Seller provided this payment to HECO on January 12, 2016, but HECO did not accept the payment as a cure and, thus, HECO maintained that it had a right to terminate each PPA on this basis. The payment is being held by HECO in an interest bearing account, and it is staff’s understanding that HECO intends to return these payments.

Second, HECO alleges that each Seller failed to “[p]rovide Company with documentation reasonably satisfactory to Company evidencing (i) the closing on financing for the Facility or (ii) the financial capability to construct the Facility by January 1, 2016 (the “Construction Financing Closing Milestone”). Further, HECO alleges that it notified each Seller that there was a thirty day cure period, and that each Seller nevertheless failed to cure.

In HECO's February 12 Report, HECO again states that Sellers have not cured important missed milestones. HECO goes on to discuss SunEdison's "apparently precarious financial position," citing to a number of news articles. However, while HECO identified other milestones or events of default that it alleges provided HECO with a right to terminate in response to PUC-IR-103, the February 12 Termination Notices were based only on the above milestones or events of default.

In summary, HECO's Termination Notices are based on (1) the alleged failure of all three Project developers to meet the Construction Financing Closing Milestone and (2) the alleged failure of two of the three Project developers to make a timely payment, although in each case, payment was made after the due date. With respect to the latter, HECO has not stated, to staff's knowledge, that there is any irreparable harm to HECO as a consequence of these failures.

3.3.2 HECO'S JANUARY 22, 2016 PROPOSAL TO SUNEDISON AND SHAW

HECO's February 12 Report does acknowledge that SunEdison, on behalf of the Sellers, asked HECO to consent to a transfer of the Projects to D.E. Shaw Renewable Investments ("Shaw"). Obviously, such a transfer, if properly accomplished, would have remedied the missed milestones identified in the February 12 Termination Notices, and placed the Projects "back on track" to meet the December 31, 2016 Guaranteed Commercial Operation Date. HECO was apparently unwilling to consent to the transfer on this date, stating that the sale to Shaw was not yet complete and was subject to several contingencies. HECO stated that it was difficult to consider such a request with limited information.

Nevertheless, HECO stated that it had attempted to work with SunEdison and Shaw to create a solution that provided benefits to customers for bearing additional risks under the PPA beyond those that were originally contemplated. On January 22, 2016, HECO proposed a set of conditions to SunEdison and Shaw pursuant to which HECO would forbear its termination rights under the PPAs ("HECO January 22 Proposal"). The January 22 Proposal can be summarized as follows:

- a. The Sellers and/or Shaw would place the following amounts into escrow by February 16, 2016: (a) for Kawaihoa - \$2.5 million; (b) for Lanikuhana - \$700,000; and (c) for Waiawa - \$2.4 million.

These amounts would be credited to ratepayers if the Projects are not in commercial operation by December 31, 2016.⁴

- b. The Sellers and/or Shaw would pay the following amounts directly to HECO by February 1, 2016, for the benefit of its ratepayers on the Commercial Operations date: (a) for Kawailoa - \$2.3 million; (b) for Lanikuhana - \$700,000; and (c) for Waiawa - \$2.3 million. These amounts are approximately equivalent to the remaining 10% value of the State tax credit previously offered to be passed through to HECO's customers. Stated differently, customers would receive the benefit of a 100% passthrough of the State tax credit rather than 90%.
- c. By February 1, 2016, Shaw would provide HECO with the following information (consistent with PPA Attachment P): (a) that Shaw has a tangible net worth of \$100,000,000 or a credit rating of BBB- or better; and (b) that Shaw has experience in the ownership of power generation facilities, and has at least five years' experience in the operation of power generation facilities similar to the Projects or has a contract with an entity having such qualifications.
- d. By February 1, 2016, Shaw would provide HECO with information regarding its plans for operation of the Projects.
- e. By February 1, 2016, Shaw would provide HECO with a firm commitment or other evidence confirming that Shaw could provide financing for each Project within the timeframe proposed by Shaw.
- f. By March 15, 2016, Shaw and/or Sellers would complete the Construction Financing Closing Milestone for each project.
- g. By March 15, 2016, the purchase and sale transaction between Shaw and SunEdison must be completed so that Shaw could be

⁴According to HECO, these amounts represent "the approximate net present value of the benefit Hawaiian Electric's customers expect to receive on average for one year of operations." (Tr. 69.)

considered the Seller for purposes of meeting the Construction Financing Closing Milestone.

- h. By February 1, 2016, Sellers, Shaw, and HECO would confirm these conditions and agreements in a written agreement. The agreement would include an agreement from Shaw and Sellers to waive any claims Sellers and Shaw might have against HECO for any delay in meeting the Guaranteed Commercial Operations Date.

As further discussed below with respect to Shaw's filings with the commission, in a letter dated January 26, 2016, Shaw accepted virtually all of these conditions and requested several modifications ("Shaw January 26 Response").

Nevertheless, rather than continue negotiations and attempt to complete the agreement, HECO decided that the conditions it had proposed could "no longer provide adequate assurance that the Projects will be completed consistent with the terms of the approved PPAs and do not justify the additional risk passed on to Hawaiian Electric's customers." (HECO Report, Cover Letter at 6.) Thus, on February 1, 2016, HECO revoked its proposed offer to forbear its termination rights under the PPAs.

Moreover, on February 8, 2016, HECO responded to later correspondence from Sellers (dated after February 1, 2016, as further discussed below), which had attempted to answer each of the concerns raised by HECO. According to HECO, despite the information provided by Shaw, "[t]he assertions and information set forth in SunEdison's February letters have not provided specific or sufficient information to allay Hawaiian Electric's concerns." See HECO's February 12 Report, Exhibit 1, p. 13 of 13.

3.3.3 DEVELOPERS' RESPONSE TO HECO'S JANUARY 22 PROPOSAL AND HECO'S FEBRUARY 12 REPORT

On February 23, 2016, Kawaihoa Solar, Lanikuhana, and WPV (i.e., the Developers or Sellers) filed Reply Comments in response to HECO's Status Report ("Sellers'

Reply”).⁵ The Sellers dispute the allegations made by HECO, and claim, among other things, that: (a) Sellers are not in default under the specific terms of the contract and various cure periods; (b) Sellers can arrange and complete a sale of the project to D.E. Shaw, which can provide the necessary financial guarantees; (c) Shaw could complete the construction by the end of 2016; and (d) Sellers and Shaw have added a number of ratepayer benefits, which would reduce the average rate to \$123.78/MWh, or 12.378 cents/kWh. Sellers also note that HECO’s position concerning replacement of these Projects with other projects would extend, not shorten, the time necessary to get projects of this size into operation (end of 2016 versus at least 20 to 30 months to do a new solicitation, obtain approvals, and build).

As noted above, the Sellers further contended that they had met the material terms of HECO’s January 22 Proposal offering to forbear termination if Shaw and/or the Sellers agreed to the stated conditions. According to the Sellers, in the January 26 Shaw Response, Shaw and Sellers agreed to all of HECO’s proposed conditions, with only minor additions and clarifications. These additions and clarifications are:

- a. Shaw and/or Sellers requested four (4) additional days to post the requested escrow payments totaling \$5.6 million; according to Sellers, this was necessary as HECO had not named an escrow holder or provided a form of escrow agreement.
- b. Shaw and/or Sellers requested one (1) additional month to close financing on the Kawaihoa Project, thus, the financing would be closed on or before April 15, 2016.
- c. Shaw and Sellers proposed to add language to the written agreement to provide that Seller will waive all claims for failure to meet Guaranteed Commercial Operations Date, “except with respect to delays due to Company’s failure to cooperate and work in good faith with Seller and Buyer, or resulting from the gross negligence or willful misconduct of the Company, or Company’s breach of the PPA.”

Contrary to HECO’s position, the Sellers and Shaw view the January 26 Shaw Response as an acceptance of HECO’s offer. Thus, the Sellers do not agree with

⁵Sellers have not been admitted as intervenors or parties to this docket.

HECO that their response was a counteroffer, and, therefore, Sellers do not agree that HECO had the right to revoke HECO's January 22 Proposal.

The Sellers further responded to HECO by way of letter dated February 3, 2016, which they allege further addressed each of HECO's concerns. Stated simply, Sellers' position is that Shaw was the solution to HECO's concerns "since once the Projects were transferred to D.E. Shaw, HECO and the Projects would be insulated from any perceived financial issues relating to SunEdison." (Sellers' Reply at 24.)

Sellers also stated that they would make Shaw's bankruptcy counsel available to further explain the bankruptcy risk issues.

In a letter to HECO dated February 5, 2016, the Sellers reiterated the points in their February 3, 2016 letter.

3.3.4 THE CONSUMER ADVOCATE'S REPLY COMMENTS

On February 23, 2016, the Consumer Advocate ("CA") filed its comments in reply to the HECO Status Report, in which it made a number of recommendations, including the following.

First, the Consumer Advocate stated that the primary issue for the commission is to determine whether the termination of the contracts is reasonable and in the public interest.

Second, the Consumer Advocate stated that SunEdison should be required to provide a complete and thorough assessment of its financial condition.

Third, the Consumer Advocate recommended that the commission consider whether or not to require a surety bond to ensure no further delays due to SunEdison's condition.

Fourth, the Consumer Advocate proposed that SunEdison be required to provide a detailed discussion of the proposed transaction with Shaw.

Fifth, the Consumer Advocate recommended that SunEdison and Shaw be required to provide separate legal opinions concerning whether or not the transaction between SunEdison and Shaw could be deemed a fraudulent transfer under the bankruptcy code.

3.3.5 FURTHER PLEADINGS AND CORRESPONDENCE

The commission staff observes that during the period from February 23, 2016, through the present, a number of letters and other pleadings from HECO and the Sellers were filed. Those will not be summarized here; they may be reviewed in their entirety on the commission Document Management System. Suffice it to say that HECO and the Sellers each continued to explain and pursue their basic positions as set forth above.

In addition, on March 16, 2016, Sellers' counsel filed a letter from Shaw to HECO, in which Shaw stated that it remained eager to find a commercially reasonable solution with HECO that would allow Shaw to acquire the Projects ("Shaw March 16 Letter"). Among other things, Shaw addressed the following topics in this letter:

a. Transaction and Construction Timing:

Entities within the Shaw group would seek to acquire the Projects from SunEdison within seven (7) business days of HECO reinstating the PPAs and providing the appropriate waiver or consent.

The acquisitions would not be subject to a financing contingency.

Construction financing would be in place within twelve weeks of the closing of the acquisitions or the Projects would agree to forfeit \$5 million of the interconnection deposit.

Shaw has spent significant time and resources negotiating financing documents for the Projects with lenders and tax equity investors who have recently closed similar transactions with other entities within the Shaw group.

b. Concessions:

As a show of goodwill, a total of \$10.4 million in combined concessions that would be provided directly to ratepayers were offered to HECO.

c. Well Capitalized and Experienced Project Sponsor:

HECO had raised concerns as to SunEdison's ability to perform as the Projects' sponsor. In response, Shaw stated that a sale of the Projects to entities within the Shaw group should help to alleviate HECO

concerns on this point. The letter noted that the Shaw group is a global investment and technology development firm with more than \$37 billion in investment capital as of March 1, 2016. Over the past decade, the Shaw group has helped build industry leading renewable projects, including First Wind. . . .

Shaw March 16 Letter at 1-2.

With respect to HECO's concerns regarding the effects of a hypothetical SunEdison bankruptcy, Shaw stated that, while its letter was not the proper forum to discuss the details of their analysis on this topic, Shaw would work with HECO to structure a transaction in a manner that fully addresses HECO's concerns. (Shaw March 16 Letter at 2.)

Finally, the commission staff observes that there are issues concerning the effect of the proposed merger between the HECO Companies and NextEra Energy, Inc. ("NextEra") on HECO's decision to terminate these three Projects. These issues are further addressed below.

3.4 FURTHER COMMISSION PROCEEDINGS

As previously noted, on February 18, 2016, the commission filed initial Information Requests in each docket, requiring HECO to respond and inviting the Consumer Advocate and Sellers to respond to the extent they desired to do so. On February 25, 2016, HECO filed its responses to those requests. Sellers also provided certain responses to those requests on February 23, 2016.

On March 4, 2016, by way of letter under signature of the commission's Chief Counsel, HECO, the Consumer Advocate, and the Sellers were notified that commission staff had been directed to conduct an investigation concerning the events surrounding HECO's decision to terminate the PPAs. The letter (a) included a set of Information Requests to HECO with a response date of March 11, 2016; the Consumer Advocate and Sellers were also invited to respond; and (b) stated that an informal technical conference would be held on March 14, 2016, for the purpose of allowing commission staff to follow up as necessary with respect to the various responses. With respect to the former, HECO filed its responses on March 11, 2016, and Sellers also provided certain responses on that date.

On March 4, 2016, the commission's Chief Clerk was informed that in response to the commission staff Information Requests issued on March 4, 2016, HECO planned to file 4,500 pages of non-confidential material (4,000 pages of which are copies of various e-mails) and 1,500 pages of confidential material (which are copies of various e-mails). Given the voluminous nature of these responses, the informal technical conference was rescheduled for March 18, 2016, so as to provide the Consumer Advocate, the parties, the developers, and the commission staff with adequate time to review the responses and prepare for the informal technical conference.

On March 18, 2016, as part of its investigation, the commission staff held the informal technical conference. In attendance were representatives from HECO, the Sellers, SunEdison, Shaw, and the Consumer Advocate. The proceedings were recorded and the transcript is available for review in the commission's offices.

4 COMMISSION STAFF ANALYSIS AND FINDINGS

In preparing this report, commission staff has reviewed all of the documents filed in each of the dockets, as well as various other reports, such as Securities and Exchange Commission ("SEC") filings by SunEdison and reports from various ratings agencies.⁶

In analyzing the events concerning these Projects, commission staff primarily focused on the period of time between January 1, 2016, and March 28, 2016. Despite the voluminous nature of the documents that were provided to the commission by HECO, the Sellers, SunEdison, and Shaw, it appears that prior to this period, the Projects were progressing normally – that is, some things proceeded smoothly while others did not. Generally, accommodations were made between the parties with respect to various delays and other problems, and construction moved forward.

In the case of these three Projects, there were clearly various milestones that were missed, and there were just as clearly accommodations made between HECO and

⁶Staff's ability to review HECO's Responses to staff's Information Requests was greatly hampered by HECO's failure to provide copies of the thousands of pages of e-mails in searchable format.

the Sellers to address many of these issues. (Tr. 34; HECO Response to PUC-IR-104). This report focuses on the specific events immediately prior to the issuance of the termination notices and certain events that followed.

4.1 SUMMARY OF FINDINGS

As discussed below, Staff's primary finding is that, even given SunEdison's deteriorating financial condition, the record does not, as it stands, demonstrate that HECO aggressively pursued negotiations with Shaw in order to complete the sales transactions, nor did it aggressively pursue an analysis of the risks associated with a sale of the Projects to Shaw and how any risks associated with a SunEdison bankruptcy could be minimized.

SunEdison's financial condition was certainly no secret to HECO, SunEdison, the Developers, or Shaw, and prompted the Developers and SunEdison to seek remedies that would keep the project on schedule and assure completion. The major remedy that appeared to be viable at the time the Termination Notices were issued was SunEdison's proposal to sell the Projects to Shaw, yet there appears to have been little interest in actively pursuing this proposal following HECO's January 22 Proposal. Instead, HECO appeared to devote the majority of its efforts to pursuing termination.

4.2 CURRENT STATUS OF FACILITIES

As of the date of termination, the Sellers had obtained approximately thirty (30) government permits and approvals, and advanced \$31.4 million to HECO for interconnection work (for example, engineering, equipment procurement, and other interconnection infrastructure). According to Sellers, HECO has made significant progress on its interconnection work for the Waiawa and Lanikuhana Projects.

In addition, the Sellers have spent over \$42 million on development, including land purchase and lease payments, project design and engineering, PPA negotiations, interconnection payments to HECO, site work, procurement of major equipment, legal expenses, and construction.

More specifically:

- a. For all three Projects, an EPC (Engineer, Procure, Construct) Agreement has been executed, and engineering is substantially complete. In addition, HECO substation procurement efforts are substantially underway.
- b. For the Waiawa and Lanikuhana Projects, grading and other site preparation work has been completed.
- c. For the Waiawa Project, clearing has been substantially completed. In addition, support post installation work covering approximately 150 acres was 55% complete, and that thousands of feet of underground wiring and more than 1,000 solar modules have been installed.⁷

According to published reports, the cessation of work following the issuance of HECO's termination notices impacted approximately 100 workers, and will potentially affect hundreds more in the future.

It is also staff's understanding that there are no amounts due and owing to HECO at this time, although certain payments are being held in a separate account or accounts, and will, apparently, be returned to Sellers at some point. (Tr. 84-85.)

Thus, at this point, the Projects are at a standstill, despite the substantial work that has already been completed. HECO stated that it is "hopeful" that someone will "take over" the Projects, but was unable to clearly articulate how such a situation would be viewed differently by a bankruptcy court as compared to Shaw "taking over" the Projects during the relevant period. (Tr. 76, 79-80.) To be sure, Shaw is a creditor of SunEdison (as further discussed below), but that fact alone does not render a sale or transfer to Shaw invalid or unlawful, particularly if the transaction would have taken place prior to any bankruptcy proceedings, and was considered to be an "arm's length" transaction.

⁷The material in this Section is summarized from the Sellers' Reply Comments, pp. 10-12 (as supported by the Affidavit of Wren Wescoatt, Direct of Development, Hawaii of SunEdison Utility Holdings, Inc.), submitted in each docket on February 23, 2016.

HECO also stated that it could issue a Request for Proposals ("RFP") to replace the projects and that it might be able to obtain a lower price if it did so. (Tr. 78) However, HECO also stated that no such RFP had been issued as of the date of the informal technical conference. (Tr. 79.)

In response to staff's question concerning whether there were any concrete plans to move forward, HECO replied:

But we had to look at a lot of things. We looked at where we were on the RPS. We looked at the fact that the ITC was extended. We didn't anticipate that last year. And we also looked at, since then we signed a PPA that was even lower than this.

So all those things considered, we realized that, you know, we can procure more between now and 2020, that hopefully meets the customers' needs and meets the RPS. We didn't have anything more concrete other than that. We didn't have a plan already drawn out. And we just knew that we would, by default, probably do an RFP since now we have time with the ITC extension.

(Tr. 95.) Yet, as staff observed at the Informal Technical Conference, all of these reasons were related to price, which was not the basis for HECO's decision to terminate the PPAs. (Tr. 96.)

Finally, it is staff's understanding that at least 20 to 30 months would be necessary to complete a new project from the issuance of the RFP through the in-service date.

4.3 SHAW'S ABILITY TO FINANCE, CONSTRUCT, AND OPERATE THE PROJECTS

As discussed below, it appears that Shaw was ready, willing, and able to purchase, construct, and operate these Projects, yet the transaction was never consummated apparently due to HECO's concerns about SunEdison's financial condition.

From the material supplied to commission staff, it appears that the first formal contact from Shaw to HECO occurred by way of letter dated January 6, 2016, from Bryan Martin and David Zwillinger, Managing Directors of Shaw, to Shelee Kimura

and Rodney Chong of HECO ("January 6 Shaw Letter"). Among other things, Shaw stated:

By way of background, affiliates of the D.E. Shaw group and Madison Dearborn Partners ("MDP") made a majority, controlling investment in First Wind Holdings ("First Wind") in 2006. Together, the D.E. Shaw group, MDP, and First Wind developed numerous utility-scale renewable energy projects in the U.S., including four wind projects in Hawaii and the solar Projects referred to herein. After nearly 10 years as active owners of First Wind, the D.E. Shaw group and MDP sold the company to SunEdison and its affiliates in January 2015. In partial consideration of the sale, SunEdison committed to make certain milestone payments to the D. E. Shaw group and MDP and issued notes payable in 2020. In light of recent developments at SunEdison, in late December 2015, the parties restructured the notes, giving the D.E. Shaw group and MDP the right to acquire certain projects from SunEdison, including the Projects in Hawaii. The D.E. Shaw group is eager to complete development of the Projects and to reach full notice to proceed ("Fntp") as quickly as possible. To this end, we have already conducted significant due diligence on the assets over the holiday period [confidential material redacted].

The D.E. Shaw group plans to acquire the Projects through its affiliate, D. E. Shaw Renewable Investments, L.L.C. ("DESRI"). DESRI is managed by the same team at the D. E. Shaw group that managed the firm's investment in First Wind, led by Managing Directors Bryan Martin and David Zwillinger (the "Team"). Since January 2012, DESRI-managed investment vehicles have acquired 15 solar projects, four wind projects, and one hybrid wind/solar project, which collectively have a capacity of more than 1,000 MW. The DESRI portfolio includes two Hawaii

projects that have PPAs with HECO - Kawaihoa Wind (69 MW) and Kalaehoa Solar Two (5 MW) - providing us with deeply relevant experience developing and operating power assets with HECO. The Team will leverage its direct experience managing the Hawaii assets of both DESRI and First Wind to oversee the successful development and operation of Mililani II, Waipio, and Kawaihoa Solar.

Over the last few years, DESRI has raised more than \$2 billion in equity, debt, and tax equity for its portfolio. We expect to capitalize on the extensive experience and documentation we have with major lenders and tax equity investors to finance the Hawaii Projects on an accelerated basis. [Confidential material redacted.]

January 6 Shaw Letter, pp. 1-2.⁸ In addition, the Letter stated that if SunEdison was unable to pay the balances due with respect to interconnection facilities of approximately \$16.6 million, DESRI was prepared to lend this amount to the Project Companies to enable payment to HECO. (January 6 Shaw Letter, p. 2.) DESRI also indicated a willingness to work with HECO to increase the portion of the State tax credit passed through to HECO to further reduce the effective rates paid by HECO's customers. (January 6 Shaw Letter, p. 2.)

Thereafter, on January 11, 2016, HECO sent a letter to SunEdison and Shaw ("HECO January 11 Letter"), stating (among other things) that HECO "must carefully consider D.E. Shaw and Seller's ability to meet the requirements of the PPA versus Hawaiian Electric's right to terminate the PPA and opportunities to secure an alternative source of renewable energy that is able to meet such requirements as quickly as possible." (HECO January 11 Letter, p. 2.)

HECO stated that it "acknowledged" its obligation to complete such analysis, and further stated that "without waiving any rights under the PPA, Hawaiian Electric would consider forbearing its right to terminate the PPA if D.E. Shaw and Seller agreed to" a number of terms that are similar but not identical to those that were

⁸The redacted material contains more specific details concerning Shaw's proposal.

incorporated into the formal HECO January 22 Proposal. (HECO January 11 Letter, p. 2.) Significant differences between the terms in the HECO January 11 Letter and HECO's January 22 Proposal include the following: (a) that Shaw would provide a firm commitment or other evidence confirming that Shaw was able to secure financing within the timeframe proposed by Shaw; and (b) that HECO, Seller, and Shaw would agree to revised PPA terms and that these terms would be submitted to the commission for approval. (HECO January 11 Letter, pp. 2-3.)

HECO concluded by stating: "[i]f D.E. Shaw and SunEdison are amenable to the conditions set forth in this letter, Hawaiian Electric will consider forbearing its rights to terminate the PPA and to meeting with D.E. Shaw and Seller to discuss concessions subject to all applicable third-party consents."

Following the HECO January 11 Letter, it is staff's understanding that representatives of HECO, SunEdison, and Shaw met to discuss terms on January 20, 2016. (HECO January 22 Proposal, p. 1.) This discussion apparently resulted in the HECO's January 22 Proposal.

In HECO's January 22 Proposal, HECO made a formal offer to SunEdison and Shaw pursuant to which HECO would agree to forbear its rights under the PPA until March 15, 2016, in exchange for SunEdison's and Shaw's agreement to a number of conditions and concessions. As stated in HECO's January 22, 2016 letter concerning Waiawa, "Hawaiian Electric will only agree to forbear its right to terminate the PPA at this time in exchange for concessions that benefit Hawaiian Electric's customers to adequately compensate these customers for bearing a greater risk under the PPA than previously negotiated between the parties and approved" by the commission. (HECO's January 22 Proposal, p. 1.⁹)

Given the conditions set forth in HECO's January 22 Proposal – and, indeed, with respect to the sequence of events that preceded this Proposal as set forth above – it is clear to staff that HECO did not seriously question Shaw's financial capability. The conditions proposed by HECO simply required – in accordance with Attachment K to the PPA as set forth above – that Shaw provide detailed information showing that "the subsidiary of D.E. Shaw that will be assigned the PPA

⁹The quoted material in this Subsection is taken from HECO's January 22 Proposal concerning Waiawa. HECO's January 22 Proposals concerning Lanikuhana and Kawaihoa contain identical or substantially similar language.

by the Seller ("Assignee") has (i) a tangible net worth of \$100,000,000 or a credit rating of "BBB-" or greater and the (ii) experience in the ownership of power generation facilities. As specifically noted by HECO, this information is required under Section 1(e) of Attachment P of the PPA in order for D.E. Shaw to take assignment of the PPA from SunEdison without formal consent from Hawaiian Electric." (HECO January 22 Proposal, p. 3 of 6, emphasis added.)

Several comments in support of this conclusion are in order. First, as already noted, HECO does not appear to have questioned Shaw's financial capability during this period of time. Moreover, not only did Shaw appear to be able to finance the sale transactions, it further appears that Shaw was more than willing to provide any additional relevant information as necessary concerning its financial ability to complete the sale transaction.

In fact, in the Shaw January 26 Response, Shaw specifically stated that:

3. By February 1, 2016, D.E. Shaw Renewable Investments, L.L.C. ("Buyer") will provide detailed information regarding Buyer's net worth, showing that the Buyer meets the qualifications set forth in Section 1(e) of Attachment P of the PPA. The sale of the project to Buyer is expected to be structured as a sale of the direct or indirect ownership interests in Seller to Buyer or to a subsidiary of Buyer. As a result, the transaction will not require an assignment of the PPA from Seller to another entity, however Buyer will provide a revised Exhibit A-2 for the PPA showing the new ownership structure. . . .

5. By February 1, 2016, Buyer will provide a firm commitment or other evidence confirming that Buyer can secure financing for the project in the time frame proposed by Buyer.

6. By March 15, 2016, the Construction Financing Closing Milestone will be completed.

7. The purchase and sale transaction between Buyer and Seller's parent company will be completed no later than March 15, 2016.

Second, as HECO had previous dealings with Shaw, HECO cannot profess ignorance of Shaw's financial condition, as well as its other capabilities.

Third, staff observes that in response to a direct question at the Informal Technical Conference concerning whether Shaw satisfied the qualifications in Attachment P to the PPA, HECO responded "[y]es, I believe so." (Tr. 19.)

Finally, staff notes that the discussion in this Section focuses primarily on financial considerations. There appears to be no real disagreement that Shaw is knowledgeable in the construction and operation of these types of Projects. In fact, HECO conceded that there have been no problems with the operation of the wind projects. (Tr. 54-55.)

4.4 SUNEDISON'S DETERIORATING FINANCIAL CONDITION

As of the date of this report, SunEdison has not yet filed its annual SEC Form 10-K for 2015, nor a recent (that is, after January 27, 2016) SEC Form 8-K disclosing any material changes to its current financial condition. Staff views these conditions as indicative of the fact that SunEdison's financial condition is extremely uncertain and that SunEdison may seek bankruptcy protection in some form. Having said that, commission staff does not agree that it was necessary, appropriate, or in the public's best interest for HECO to file termination notices with respect to these Projects as of February 12, 2016, without further consultation or negotiation with SunEdison and Shaw. In commission staff's view, HECO's focus at that point in time should have been to investigate how to accomplish closing the sales transactions with Shaw so that the construction, and timely completion and operation of the Projects, could be accomplished.

Certainly, it seems reasonable to conclude that any conceivable risk to these Projects that comes as a consequence of future bankruptcy by SunEdison should and could have been thoroughly and properly vetted through negotiations between HECO, SunEdison, and Shaw that included counsel and others with expertise in such matters. Likewise, appropriate steps to mitigate any perceived

risks could have been so vetted. While it is not certain that such negotiations would ultimately prove successful, there appears to have been no concerted effort by HECO to participate in negotiations with this focus.

Commission staff also observes that SunEdison's financial concern was well known prior to January 1, 2016. In fact, the major decline in SunEdison's stock price occurred between July, 2015, and December, 2015. (See, e.g., HECO Response to PUC-IR-105, Attachment 1, page 7 of 17.) Moreover, in response to PUC-IR-108, HECO stated that one of its concerns with Shaw was Shaw's status as a creditor of SunEdison, referencing SunEdison's SEC Form 8-K, dated December 30, 2015. (SunEdison's SEC Form 8-K from December 30, 2015, is attached as Exhibit 1 to HECO's response to PUC-IR-101.)

Clearly, sufficient information concerning SunEdison's financial condition - including an indication that a bankruptcy was possible - was in HECO's possession prior to HECO's January 22 Proposal outlining the conditions necessary for HECO to forebear termination and allow the sale of the projects to Shaw to be completed. Likewise, there was a ready, willing, and able purchaser at that point in time - Shaw.¹⁰ Nevertheless, within days of HECO's January 22 Proposal, HECO became, in staff's view, unwilling to seriously negotiate with SunEdison and Shaw even though the terms proposed by HECO had been largely agreed to by Shaw.

It should also be observed that SunEdison and Shaw recognized that there were at least some risks to completing the sales transactions if SunEdison later sought bankruptcy protection or was forced into bankruptcy by its creditors.¹¹ However, Shaw and SunEdison did not believe those risks to be as serious as HECO believed them to be, and, perhaps more importantly, were willing to negotiate terms to address any such risks.

¹⁰ It appears that HECO was aware that SunEdison had selected Shaw as the purchaser much earlier than January 22, 2016.

¹¹ As of the date of this report, staff is not aware of any reported efforts by creditors to force SunEdison into bankruptcy.

4.5 THE RELATIONSHIP BETWEEN SUNEDISON'S FINANCIAL CONDITION AND SHAW'S OFFER TO PURCHASE THE PROJECTS

As discussed throughout this report – and as recent events have shown – SunEdison's financial condition was certainly well known, as was the possibility that SunEdison would either voluntarily file for bankruptcy protection, or be forced into bankruptcy. However, as discussed herein, even given SunEdison's financial condition, commission staff's view is that, given Shaw's expressed willingness to acquire, construct, and operate the three Projects, HECO could and should have aggressively pursued a way by which to ensure that construction of these Projects would continue and that commercial operations would be achieved by the end of 2016, even if a SunEdison bankruptcy occurred.

Moreover, even if such negotiations ultimately proved unsuccessful, staff's view is that the February 12 Termination Notices were issued summarily, that is, they were issued before Shaw's ability to acquire the Projects and the issues related to SunEdison's bankruptcy were fully explored. By terminating the PPAs, HECO made any transfer of the PPAs pursuant to the provisions discussed in this report impossible unless HECO later agreed to withdraw its February 12 Termination Notices.

This further complicated an already complicated state of affairs, and provided HECO with a degree of control over any potential assignment of the now-terminated PPAs that it did not have prior to termination. Stated differently, terminating the PPAs left HECO in the position – at least prior to any necessary commission approval – of being able to dictate terms in exchange for its agreement to withdraw the February 12 Termination Notices without complying with any of the requirements contained in the now-defunct PPAs as approved by the commission.

As discussed, HECO's central concern with respect to its decision to terminate the three Projects appears to be grounded in its view - at the time - that SunEdison would file for, or be in, bankruptcy in the near future, and in its fear of the effect that action would have on timely completion of the Projects by the Guaranteed In Service Date. As staff understands HECO's position at the time of the termination notices, HECO believed that even if the Projects were sold to Shaw, the filing of a bankruptcy petition would or could result in a stoppage of construction.

Staff believes that HECO's focus during the period from January 26, 2016, through February 12, 2016, was misdirected. Faced with the alleged failure of all three Project developers to meet the Construction Financing Closing Milestone and the alleged failure of two of the three Project developers to make a timely payment (although in each case, payment was made after the due date and is being held by HECO), HECO appeared to focus its efforts on ways to rationalize a decision to terminate the Projects, rather than focusing on ways to ensure that construction of the Projects would be completed timely by negotiating a final agreement with SunEdison and Shaw, and taking the necessary steps to minimize any risks associated with that agreement, including the risks associated with a bankruptcy filing by SunEdison.

Moreover, during this period, HECO stated that it was operating on parallel tracks. That is, according to HECO, it began to consider terminating the PPAs on or about January 27, 2016, and requested NextEra's approval to do so on February 10, 2016.¹² (Tr. 25-27.) Thus, while HECO was considering termination, it was, at the same time, both (a) continuing to work with SunEdison and Shaw to come to a solution that would protect customers and allow construction to move forward (Tr. 25), and (2) continuing "business as usual" with respect to interconnection work, although SunEdison was informed that there was some risk involved (Response to PUC-IR-104 and Tr. 34).

Shaw clearly stated, however, that the February 12 Termination Notices were the first notice that Shaw received that the PPAs had been terminated. (Tr. 14.) Shaw went on to state that there were no discussions with HECO prior to February 12, 2016, in which HECO indicated that the projects would be terminated. (Tr. 14-15.) In fact, Shaw stated that it "did not expect the projects to be terminated." (Tr. 14-15.)

Indeed, as previously discussed, up to the point of HECO's January 22 Proposal, HECO did not appear to have the level of concern with SunEdison's financial condition that it raised subsequent to January 26, 2016. When asked at the informal technical conference what had changed between January 22, 2016, and

¹² Other than obtaining NextEra Energy, Inc.'s ("NextEra") approval (on or about February 10, 2016) to issue the February 12 Termination Notices, HECO categorically stated that NextEra was not involved in the decision to terminate the PPAs.

January 26, 2016, HECO responded that “[t]he bankruptcy concerns . . . were heightened after January 22nd, by the January 27th 8-K, and then also the Latin America deal and our conversations with our bankruptcy counsel that ensued.” (Tr. 35.) In addition, HECO again referred to the missed milestones and missed payments discussed above.

SunEdison’s SEC Form 8-K dated January 27, 2016, was for the purpose of notifying the SEC that on January 26, 2016, SunEdison entered into a letter agreement with Greenlight Capital, one of SunEdison’s shareholders to promptly appoint Claire Gogel to serve as a director, effective immediately. Staff understands that some observers sometimes view such an action as an indication that a bankruptcy filing is imminent. Nevertheless, the January 27, 2016 Form 8-K filing should not have come as a great surprise to anyone following SunEdison’s financial trajectory.

The “Latin America deal” refers to an agreement entered into by SunEdison to buy Latin America Power for \$733 million; Latin America Power owns clean energy projects (including wind and hydropower plants), in Chile and Peru. As staff understands this issue, shareholders of Latin America Power initiated a lawsuit to stop SunEdison from shifting assets outside of its ordinary course of business, and the judge in the case had issued a temporary restraining order. Latin America Power was seeking \$150 million through arbitration for the failed deal, but agreed to a settlement of \$28.5 million. As SunEdison stated at the conference, the settlement was announced on March 4, 2016, and, as a result, the lawsuit was dismissed. (Tr. 37.)

In staff’s view, these two events demonstrate the transient nature of financial issues facing SunEdison, and underscore the basic conclusion that had HECO been *more aggressive in attempting to close the sales transactions with Shaw* following HECO’s January 22 Proposal and the Shaw January 26 Response, it may have been possible to keep the Projects on schedule to meet the commercial operations date of December 31, 2016. That is not to say that there would have been no risk in proceeding in that fashion, but given the nature of Projects and their relationship to Hawaii’s clean energy goals, it appears that there could have been much greater effort in attempting to complete the sales transactions with reasonable protections against any risks posed by SunEdison’s financial condition.

Certainly, it appears that much more discussion and negotiation between the parties could and should have occurred. As discussed in this report, there was a further proposal from Shaw on March 16, 2016, referenced herein as the Shaw March 16 Letter, suggesting a path forward and reiterating that Shaw remained eager to find a commercially reasonable solution to the issues and was available to engage in face-to-face meetings in Hawaii over a ten day period following the letter. When asked at the Informal Technical Conference whether HECO had met with, or agreed to meet with, Shaw in response to the Shaw March 16 Letter, HECO stated: "[n]o, Mr. Oshima is away in Washington D.C. He has received the letter and reviewed it but I'm not aware that there's been any discussions. He should be back in town next week." (Tr. 12.)

In staff's view, this response indicates that HECO did not feel any sense of urgency to attempt to resolve the issues. At the conclusion of the Informal Technical Conference, Chief Counsel asked HECO, SunEdison, and Shaw to "report back to [the commission] by the close of business Tuesday [March 22, 2016]. If there are any negotiations or if there simply won't be or aren't or they're finished, we would like to know that." (Tr. 126.)

In response to this request, on March 21, 2016, Shaw filed a letter to the commission's Chief Counsel from Bryan Martin of Shaw which stated, among other things:

On behalf of the D. E. Shaw group, I wish to reiterate that we remain eager to find a commercially reasonable solution that would allow us to acquire the Projects. I believe the best way to reach that solution is through an in person negotiation with senior HECO decision makers as soon as possible, and I believe we are capable of executing a transaction that addresses all of HECO's concerns.

In the interest of time and as a sign of our interest in finding a solution, I am prepared to travel to Hawaii for meetings this Thursday and Friday, March 24th and 25th. In order to finalize travel arrangements and ensure a productive discussion, I will need prior confirmation from

HECO as to the availability of their senior decision makers and their commitment to finding a commercially reasonable solution during our two days of discussions.

I understand that HECO has indicated they will need additional information. Rather than risk additional delay, I suggest that we use Thursday's and Friday's sessions to answer any of HECO's remaining questions. To the extent we cannot provide answers during those meetings, we will seek to have responses available the following Monday, March 28th.

Once again, I urge HECO to commit the senior resources necessary to come to a commercially reasonable solution such that we can acquire the Projects. Additional delay in reaching such solution, irrespective of the reasons for the delay, further jeopardizes the construction of important incremental clean energy generation that would advance Hawaii's goal of 100% renewable electric generation.

On March 22, 2016, HECO filed a copy of a letter from Alan Oshima of HECO to Shaw stating, among other things:

However, regarding timing of the Projects, as was communicated at the Informal Technical Conference and explained in responses to the State of Hawai'i Public Utilities Commission ("Commission") information Requests, we do not anticipate our customers will be negatively impacted by an incremental delay, given the Projects current pricing and the current historically low oil prices. With continued declines in PV technology costs, coupled with the extension of the Investment Tax Credit, our primary objective is to procure projects in a timely manner that offer the greatest benefit to our customers while furthering our progress in achieving Hawaii's renewable energy goals.

As expressed in several letters to both D.E. Shaw and the Projects, we remain acutely concerned about the risk of the Projects being pulled into a bankruptcy proceeding and the unacceptable uncertainty that this situation would present to both Hawaiian Electric and our customers. If that occurs, Hawaiian Electric and the Commission would be hampered in being able to effectively manage the limited available generation capacity of the grid. It would also expose customers to an indefinite time for when they might receive clean energy and financial benefits from the Projects.

However, as a follow up to this past Friday's [March 18, 2016] Informal Technical Conference with the Commission staff and Consumer Advocate, Hawaiian Electric is open to hearing the details of a proposal from D.E. Shaw that fully addresses the bankruptcy risks and concerns we have raised in previous correspondence and at the Informal Technical Conference. We note that the attached March 18, 2016 SNL article and the March 22, 2016 Greentech Media article, for example, continue evidence of the concerns we've communicated thus far. Any new proposal should also provide increased concessions in response to the Consumer Advocate's concerns that the concessions offered to date are not sufficient to compensate Hawaiian Electric's customers for the risks they may be exposed to. The Company asks that a formal proposal addressing our bankruptcy concerns and containing enhanced terms and conditions be provided by Friday, April 1, 2016, in advance of scheduling a meeting to discuss the details during the week of April 4, 2016.

In commission staff's view, the HECO and Shaw correspondence raised several points. First, there again appeared to be no sense of urgency on HECO's part to try to see if there is a path forward with Shaw. In staff's view, HECO, SunEdison, and

Shaw had made their positions known to each other as early as January 26, 2016, and as of at least March 18, 2016. A face-to-face negotiation appeared to be the next logical step, and would have assisted HECO, SunEdison, and Shaw in, among other things, clearly defining what additional material concerning Shaw was required, what the bankruptcy risks were and how they could be addressed, and other pertinent issues.

Second, commission staff is unclear as to what Shaw would have placed in another "formal proposal" as requested in HECO's March 22, 2016 letter to Shaw. As outlined in this report, Shaw made a number of concessions, agreed to supply additional information concerning its financial status, and agreed to "work with HECO to structure a transaction in a manner that fully addresses HECO's [bankruptcy] concerns." (Shaw March 16 Letter at 2.) Again, at this point, face-to-face negotiations appeared to have been the appropriate next step.

Third, while somewhat unclear, it appears that there were no serious, face-to-face negotiations between HECO, SunEdison, and Shaw, from January 27, 2016, through April 4, 2016, a period of sixty-eight days. Again, given the potential for a bankruptcy filing by SunEdison, it appeared that HECO's tactic was to delay any further negotiations with Shaw, knowing that if SunEdison actually filed for bankruptcy, any further activity with respect to the Projects would be under the auspices of the bankruptcy court. Staff believes it would have been far better to attempt to pursue ways to continue the Projects while minimizing any risk that the Projects would have been affected by the bankruptcy.

Fourth, HECO's statement that it "do[es] not anticipate our customers will be negatively impacted by an incremental delay, given the Projects current pricing and the current historically low oil prices," is troubling to staff. The concern is twofold.

One, as discussed, HECO does not currently have an RFP issued to replace the Projects. Despite some comments from HECO that such a process may take place more rapidly than the process here, there is no assurance that that is true. Typical projects of this nature take 20 to 30 months to develop, obtain approvals, and construct. Moreover, staff observes that HECO initially sought waivers for

approval of these projects in order that they be developed quickly.¹³ HECO's comments concerning delay at this point appear to be at odds with its original requests.

Two, commission staff is concerned that HECO believes that decreasing prices are a reason to investigate and pursue ways to terminate commission-approved PPAs. Commission staff, of course, supports efforts to minimize costs to ratepayers. At the same time, if one waits to execute contracts in an era when solar prices continue to decrease, projects may never be built as one will always be waiting for the next lowest price. Such an approach will not assist the State in reaching its RPS goals, and ignores the time spent by the commission in analyzing and approving a given PPA.

Fifth, given all of the discussion concerning the potential bankruptcy, it seems odd that no written opinions from qualified bankruptcy counsel addressing the specific issues involved in having Shaw purchase the Projects have been prepared and exchanged between HECO, SunEdison, and Shaw, or submitted to staff during this investigation. While the transcript of the Informal Technical Conference includes comments of various bankruptcy counsel, and indicates that there may also have been at least one telephone conference concerning these issues,¹⁴ there again does not appear to have been a concerted effort to discuss the bankruptcy issues and ways in which to minimize any risk resulting from a SunEdison bankruptcy filing.

¹³ For example, in HECO's application in Docket No. 2014-0356, HECO stated, among other things, that "[i]n its Inclinations, the Commission emphasized that in order for the Company 'to further stabilize and lower the costs of generation, the HECO Companies should expeditiously [seek high penetrations of lower-cost, new utility-scale renewable resources' and that the Company 'should continue to pursue alternative procurement strategies to ensure that the lowest cost utility-scale renewable energy projects are acquired.' The Waiver Projects, including this Project, meet the above directives set forth in the Commission's Inclinations." Application at 4-5. To be sure, HECO observed that one reason for its request for expedited treatment was based in the belief that certain tax credits would expire at the end of 2016. Those credits have now been extended. Nevertheless, the other reasons cited by HECO in support of expedited treatment, such as expeditiously implementing high penetrations of lower cost, utility scale renewable resources remain valid and necessary to achievement of the State's RPS goals.

¹⁴ At the technical conference, HECO indicated that there was one such discussion on February 12, 2016, between in-house counsel from SunEdison and D.E. Shaw and bankruptcy counsel for Shaw. (Tr. 32.)

Bankruptcy concerns are certainly not to be taken lightly. Moreover, staff is mindful of the fact that it does not have the requisite expertise to resolve such issues. Having said that, however, staff is also aware that such expertise is available, and was apparently relied on to some degree, although informally, by HECO in making its decision to terminate. Likewise, SunEdison and Shaw had access to, and have relied upon, such expertise, and have offered to make that information and resource available to HECO. Staff's view is that HECO, SunEdison, and Shaw should have used such expertise to both produce detailed explanations and support of their positions, and to see whether accommodations could be reached.

4.6 SHAW'S STATUS AS A CREDITOR OF SUNEDISON

Following the Shaw January 26 Response, HECO raised a concern that it does not appear to have raised previously according to the material supplied to staff: that Shaw's status as a creditor of SunEdison and its proposal to reduce the amount of outstanding debt owed by SunEdison to Shaw in exchange for the Projects would raise a number of issues should SunEdison file for bankruptcy.

Stated simply, HECO's position is that "SunEdison was looking to do a deal with their creditor[,] [a]nd that would be fine if we didn't have concerns about what the bankruptcy court may view." (Tr. 44.) While HECO did not obtain a written opinion from its bankruptcy counsel on this matter, at the technical conference, HECO's bankruptcy counsel stated:

Furthermore, when I found out that D.E. Shaw is actually a creditor of SunEdison, and as Becca Dayhuff mentioned, the structure of this transaction is very troubling because it's obvious what D.E. Shaw is attempting to do is to improve its position vis-à-vis SunEdison in that it's owed hundreds of million dollars of debt. It's agreed to a transaction where it would get forgiveness of \$90 million to the parent company in return for getting these assets.

(Tr. 48.) As staff understands HECO's position, HECO is concerned that the structure of this transaction may raise questions concerning whether this transaction can be viewed as a fraudulent transaction and set aside by a bankruptcy court.

SunEdison's bankruptcy counsel disagreed:

I don't think the structure of the transaction is troubling here, again because SunEdison is not the seller. If SunEdison were the seller and there was some type of cancellation indebtedness from SunEdison, then some of these issues might be relevant. Because the seller is a subsidiary holding company, without a true holding company, without any creditors, I don't think that there's a real -- any kind of significant fraudulent transfer concern. It's essentially very, very well -- even assuming that there was a fraudulent transfer issue, the issue for the bankruptcy court in that circumstance is most likely not going to be the bankruptcy judge ordering the projects be transferred back to SunEdison. It's going to be the bankruptcy judge entering a monetary judgment against D.E. Shaw if D.E. Shaw didn't give fair value for the projects.

Even leaving all of that aside, the last thing that a bankruptcy judge is going to look to do when faced with projects that are under construction is to stop construction of those projects, because that impairs the value of a project for all of the stakeholders in the bankruptcy. So it's very common in large bankruptcy proceedings or any kind of bankruptcy proceedings where a project is under construction or is operating, for the bankruptcy judge to allow and even encourage those operations to go forward.

(Tr. 49-50.)

Obviously, there is a difference of opinion. Yet, as discussed above, there does not appear to be a formal written opinion concerning these issues from bankruptcy counsel for HECO, SunEdison, or Shaw. (Tr. 41-42, 46, 48-49.)

In the absence of a formal written opinion from qualified bankruptcy counsel, and based on the information provided in this record, it is impossible to come to a

definitive conclusion with respect to this issue. The question may be as complicated as whether or not structuring the sale transactions in this way increases any risk that a bankruptcy court would set aside the transaction as a fraudulent conveyance or a fraudulent concealment of facts. On the other hand, the question may be as simple as whether Shaw paid a market based price for the Projects.¹⁵ These questions can be – and should have been – thoroughly analyzed by qualified counsel or other qualified entities as HECO apparently deemed them to be important. Certainly, this is not the first time such issues have arisen, and there may be ways to ensure that the transactions will pass muster if presented to a bankruptcy court for review.

From staff's point of view, there does not appear to have been any concerted effort between HECO, SunEdison, and Shaw either to analyze and to resolve these differences to each entity's satisfaction, or to investigate and agree upon alternatives or conditions that could reduce any perceived risk to ratepayers which might arise from financing the sale transactions in this fashion.

4.7 COMMENTS CONCERNING SHAW'S JANUARY 26 RESPONSE

As discussed above, despite SunEdison's financial condition, HECO made a proposal to SunEdison and Shaw on January 22, 2016. On January 26, 2016, Shaw responded by accepting the terms, with the conditions and modifications discussed above.

Staff's conclusion, as noted above, is that based on this record, HECO does not appear to have aggressively pursued negotiations with Shaw, nor does it appear that HECO aggressively pursued an analysis of ways to minimize the risks of completing the sales transactions with Shaw.

Staff has the following additional comments with respect to the Shaw January 26 Response.

First, Shaw requested that it be permitted to make the \$5.6 million payment to HECO by Friday, February 5, 2016, as opposed to Monday, February 1, 2016, so that it would have adequate time to establish the escrow accounts as HECO had not provided any instructions concerning same. During the technical conference, HECO

¹⁵ While not discussed in detail in this report, Shaw was selected through an auction process that involved approximately "10 or so" different prospective buyers. (Tr. 60-62.)

was asked whether this seemingly short delay was material, and HECO responded that it was "more concerned with the date change for the Kawaiiloa PPA for the condition of financing," which is discussed below. (Tr. 24.)

With respect to the escrow issues, in Staff's view, this proposed modification was minor, particularly in light of the fact the escrow accounts had to be established. A review of the documents provided by HECO reveals no specific reason why this short delay could or would not be granted and, as noted, HECO did not provide any such reason at the informal technical conference.

Second, Shaw and/or Sellers requested one (1) additional month to close financing on the Kawaiiloa Project, thus, the financing would be closed on or before April 15, 2016. This condition does not appear to have been directly addressed by HECO either prior to or during the Informal Technical Conference. While the requested extension is clearly longer than that requested with respect to the escrow accounts, staff observes that this is the very type of issue that a face-to-face negotiation could have helped to resolve.

Third, HECO was asked why it would object to the addition of the language proposed by Shaw which stated that Seller would waive all claims for failure to meet the Guaranteed Commercial Operations Date, "except with respect to delays due to Company's failure to cooperate and work in good faith with Seller and Buyer, or resulting from the gross negligence or willful misconduct of the Company, or Company's breach of the PPA." In response, HECO stated that it "had concerns with the broadness of this. There was no timing associated with the exception." (Tr. 23-24.) HECO conceded, however, that it had not responded to this specific language because "[w]e just decided that we no longer wished to move forward." (Tr. 24.)

In staff's view, the language offered by Shaw is fairly standard contract language. While it may be that the phrase "good faith" is sometimes difficult to define, many contracts contain language requiring good faith negotiations concerning a variety of issues. Staff believes any issues with this language could have been easily resolved. More importantly, HECO's response to questions concerning this issue support the view that HECO was more interested in finding ways to terminate the Projects at this point than in trying to move forward with them.

Finally, as noted above, it is SunEdison's position that SunEdison and Shaw had a binding contract with respect to HECO's January 22 Proposal and the Shaw January 26 Response. During the Informal Technical Conference, staff asked HECO what would happen if SunEdison litigated that issue and was successful, resulting in damages for breach of contract. After first answering that HECO would be responsible for paying those damages, HECO then said it might try to pass those damages on to ratepayers. According to HECO, that decision would depend on "whether our actions were reasonable and prudent under the circumstances." (Tr. 67.) Given HECO's position that it was prudent for HECO to terminate the PPAs based on their fears concerning SunEdison's bankruptcy, this is a curious response.

4.8 STATUS OF NEGOTIATIONS AFTER APRIL 4, 2016

Apparently, the face-to-face negotiations discussed in HECO's March 22, 2016 letter have not occurred. In a letter to HECO dated April 4, 2016, Shaw stated:

As you may be aware, since the date of your letter, SunEdison, Inc.'s ("SunEdison") stock price has declined by nearly 90%, driven, in part, by reports of a U.S. Securities and Exchange Commission investigation into the company. In addition, earlier this week, a company controlled by SunEdison publicly acknowledged that there is a substantial risk that SunEdison will soon seek bankruptcy protection.

Although we do not know whether (or, if so, when) SunEdison will file for bankruptcy, we believe that a sale of the Projects to the D.E. Shaw group in a bankruptcy proceeding would alleviate HECO's primary concern—that such a sale would be the subject of a fraudulent conveyance or preference claim—as the bankruptcy court would need to approve such a sale, thereby eliminating this risk. Because we and HECO disagree as to the risks associated with a prebankruptcy sale of the Projects, and because a SunEdison bankruptcy may be imminent, we would like to take you up on your offer to meet, but would like to meet later in April, when there is

a substantial chance your concerns regarding potential challenges to a sale will have been alleviated.

We continue to believe that we can find a commercially reasonable solution that benefits HECO, the D. E. Shaw group, and Hawaii ratepayers, and we look forward to continuing to work with HECO to achieve this important objective.

In a letter to Shaw dated April 5, 2016, HECO responded, in part:

Hawaiian Electric is committed to adding more renewable resources in a way that will benefit our customers. Therefore, our desire is to complete the work we initiated in getting grid solar projects online as soon as reasonably possible. Waiting until the end of this month for a determination of the bankruptcy seems reasonable under the circumstances.

We are not agreeing to exclusively discuss with you alternatives to the SunEdison project slots. We remain willing to discuss any proposal from D.E. Shaw or any other potential purchaser of the projects from bankruptcy. However, as I made clear in my March 22, 2016 letter, such discussion will only be productive if such purchaser provides us a formal proposal addressing our concerns about the projects or PPAs being affected by SunEdison's bankruptcy case, and containing enhanced terms and conditions in advance of the meeting. Discussions must include benefits to our customers, retention of regulatory oversight by Hawaii regulators and no liability to Hawaiian Electric.

In the meantime, Hawaiian Electric reserves all of its rights to take any action with respect to the Mililani II, Waipio PV, and Kawaihoa solar projects, each of which is presently terminated.

Thus, in staff's view, HECO has made it clear that, at this point, it is not interested in exploring a sale to Shaw that would involve HECO's withdrawal of the February 12 Termination Notices in exchange for certain commitments from SunEdison and Shaw so as to ensure the achievement of an in-service date of December 31, 2016, or within a few weeks of that date. Instead, although the above-quoted language from HECO is not altogether clear, HECO apparently intends to await a SunEdison bankruptcy, and will address any proposal from Shaw along with any other potential purchaser from bankruptcy. In staff's view, this correspondence supports the view that a window of opportunity whereby the Projects could have been assigned to Shaw under the terms of the existing PPA and thereby kept on track has been missed.

5 CONCLUSION

It is within HECO's management discretion to determine whether or not to terminate these PPAs. However, it is the commission's mandate to determine whether or not that decision was in the public interest with respect to passing through to ratepayers any costs associated with, or otherwise attributable to, that decision.

Based on the record before it, commission staff's position is that HECO acted too hastily and without an in-depth analysis of any perceived bankruptcy concerns in issuing the February 12 Termination Notices. There does not seem to have been a great deal of distance between HECO on one hand, and SunEdison and Shaw on the other, with respect to HECO's January 22 Proposal and the Shaw January 26 Response. Yet, despite many offers to have face-to-face negotiations, from Shaw in particular, such negotiations have not taken place. Particularly in light of HECO's expressed concern that SunEdison might file for bankruptcy, time was of the essence in attempting to finalize the deal with Shaw. Not only did this not occur, but there appeared – and appears – to be no urgency on the part of HECO to at least attempt to have these three Projects go forward. Rather, it is clear that HECO has decided that termination is the alternative that it intends to pursue, and that delaying any further detailed negotiations with SunEdison and Shaw is consistent with this alternative.

Staff finds HECO's decision to terminate particularly puzzling in light of the fact that Shaw, through its subsidiaries, appears to be well qualified to finance, construct, and operate the Projects. In fact, HECO has direct experience in dealing with Shaw. Moreover, Shaw was willing to back up its promise to complete the Projects by December 31, 2016, with a substantial sum of money to be paid to HECO's customers in the event that the in-service date was not met. Under these circumstances, staff believes that further negotiations were clearly warranted.

It may well be that in the final analysis, proceeding with Shaw presented risks from SunEdison's potential bankruptcy that could not be addressed in a fashion that minimized the risk that a bankruptcy court would set aside, claw back, or otherwise order that construction of the Projects be halted. The problem, in staff's view, is that the formal, detailed analysis by qualified bankruptcy attorneys or other qualified parties to make that conclusion has never been undertaken. In the absence of any such qualified opinion, HECO needed to undertake a thorough analysis on its own, but, in staff's view, it has not done so.

No transaction can ever be fully insulated from all risk, but there are ways to structure a transaction so as to minimize risks and, given the importance of these three Projects to the State's renewable energy goals, a thorough analysis of these issues was, in staff's view, not only necessary, but required.

Finally, as previously stated, it is the commission's mandate to determine whether or not HECO's decision to terminate was and is in the public interest. That determination need not be made at this time, but may become relevant in a variety of circumstances, from attempted recovery of costs associated with these three PPAs from ratepayers, to attempted recovery of costs and/or damages associated with litigation between HECO and SunEdison, or HECO and Shaw, to potential failures to meet RPS goals as prescribed by the legislature due to the termination of these Projects, to attempted recovery of costs associated with proceedings to obtain commission approval of future PPAs to replace the PPAs that have been terminated here.

The list is not exhaustive, and is not meant to predetermine how the commission will respond to any of these issues should they be presented. Moreover, HECO will have a full opportunity to - and, indeed, will be required to - provide additional information with respect to the termination of the PPAs in any such proceeding to

demonstrate that its actions here were in the public interest, and that any costs associated with, or attributable to, that decision, are appropriate.

At this juncture, however, commission staff's position is that the actions taken by HECO cannot be viewed as serving the best interests of the State or the people of Hawaii.

Respectfully submitted,

A handwritten signature in cursive script, reading "Thomas C. Gorak", written in black ink.

Thomas C. Gorak, Chief Counsel

Delmond J.H. Won, Executive Officer

James P. Griffin, Chief of Policy and Research

Steven J. Iha, Chief Auditor

David C. Parsons, Supervising Economist

Debra Abe, Auditor

Caroline C. Ishida, Staff Counsel

April 12, 2016

APPENDIX A

Attachment K, Guaranteed Project Milestones

There were five Guaranteed Project Milestones in each PPA:

- a. Provide Company with a copy of the executed Facility equipment, engineering, procurement and construction, or other general contractor agreements.
- b. Provide Company with redacted copies of executed purchase orders/contracts for the delivery and installation of Facility turbine(s)/generator (s) and the step-up transformer(s).
- c. Provide Company with documentation reasonably satisfactory to Company evidencing (i) the closing on financing for the Facility or (ii) the financial capability to construct the Facility ("Construction Financing Closing Milestone").
- d. 180-Day Milestone: Seller shall complete the following:
 1. Provide Company with documentation reasonably satisfactory to Company evidencing the filing by or on behalf of Seller of the following applications for Governmental Approvals required for the ownership, construction, operation and maintenance of the Facility.

The final milestone – and the most important, in staff's view – was the "Guaranteed Commercial Operation Date," which was to be December 31, 2016.

Attachment L, Reporting Milestones

There are eleven Reporting Milestones:

- a. Permit Application Filing Date for the Governmental Approvals specified in Attachment K (Guaranteed Project Milestones).*

- b. Seller shall provide Company with a copy of the executed Facility equipment, engineering, procurement and construction, or other general contractor agreements.*
- c. Seller shall provide Company with copies of executed purchase orders/contracts for the delivery and installation of Facility turbines/generator(s) and the step-up transformers, unless included in the engineering, procurement and construction, or other general contractor agreement.*
- d. Seller shall provide Company with copies, as applicable, of executed Facility operating agreements.
- e. Seller shall provide Company with documentation reasonably satisfactory to Company evidencing (i) closing on financing for the Facility or (ii) proof of financial capability to construct the Facility ("Construction Financing Closing Milestone").*
- f. Construction Start Date (as defined in the Definitions section of the Agreement).
- g. Seller shall have laid the foundation for all Facility buildings, generating facilities and step-up transformer facilities.
- h. All generator(s) shall have been installed at the Site.
- i. The main step-up transformer shall have been installed at Seller's substation.
- j. Seller shall have constructed Seller's substation and such facilities are capable of being energized.
- k. The Acceptance Test of the Facility commences.

Two comments are in order with respect to the Reporting Milestones. First, the PPA states that certain events (indicated by an asterisk above) are "Reporting Milestones" for purposes of the "Reporting Milestone Date" specified in this Attachment L. These same events constitute the "180-Day Milestone" specified in Attachment K (Guaranteed Project Milestones). In order to allow HECO to monitor project progress, the "Reporting Milestone Date" for each of these events should

be prior to the 180-Day period specified in Attachment K (Guaranteed Project Milestones). However, if the "Reporting Milestone Date" for one or more of these events is equivalent to the 180-Day period specified in Attachment K (Guaranteed Project Milestones), any such event should be deleted from Attachment L (Reporting Milestones) and appear only as Attachment K (Guaranteed Project Milestones).

Second, given HECO's decision to terminate the PPAs, many of the Reporting Milestones have been rendered moot.